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Review of implementation of the United Nations Convention against Corruption

Set of non-binding recommendations and conclusions based on lessons learned regarding the implementation of chapters III and IV of the United Nations Convention against Corruption

Note by the Secretariat

Summary

In paragraph 11 of its resolution 6/1, the Conference of the States Parties to the United Nations Convention against Corruption requested the Implementation Review Group to analyse the information on successes, good practices, challenges, observations and technical assistance needs emanating from the country reviews of the first review cycle, considering the thematic implementation report prepared in accordance with paragraph 35 of the terms of reference, and to submit a set of non-binding recommendations and conclusions based on lessons learned regarding the implementation of chapters III and IV of the Convention to the Conference for its consideration and approval at its seventh session. In its decision 7/1, the Conference took note of the set of non-binding recommendations and conclusions, as reviewed by the Implementation Review Group at its resumed eighth session. At that session, it was noted that the set of non-binding recommendations and conclusions would be made available at future sessions of the Group to inform further discussion. Accordingly, the set of non-binding recommendations and conclusions, as contained in the present note, is herewith brought to the attention of the Group for its consideration.

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I. Introduction

1. In paragraph 11 of its resolution 6/1, the Conference of the States Parties to the United Nations Convention against Corruption requested the Implementation Review Group to analyse the information on successes, good practices, challenges, observations and technical assistance needs emanating from the country reviews of the first review cycle, considering the thematic implementation report prepared in accordance with paragraph 35 of the terms of reference of the Mechanism for the Review of Implementation of the Convention, and to submit a set of non-binding recommendations and conclusions based on lessons learned regarding the implementation of chapters III and IV of the Convention to the Conference for its consideration and approval at its seventh session.

2. On the basis of that mandate, the Secretariat submitted a set of non-binding recommendations and conclusions (see CAC/COSP/2017/5) to the Conference for its consideration and approval at its seventh session. In its decision 7/1, the Conference took note of the set of non-binding recommendations and conclusions, as reviewed by the Implementation Review Group at its resumed eighth session. At that session, it was noted that the set of non-binding recommendations and conclusions would be made available at future sessions of the Group to inform further discussion.

3. Accordingly, the set of non-binding recommendations and conclusions, as contained in the present note, is herewith brought to the attention of the Group for its consideration. The note reflects comments received from States parties in response to a discussion paper (CAC/COSP/IRG/2017/3) that was made available to States parties for comments before the seventh session of the Conference and included in the discussions of the Working Group on Prevention of Corruption and the Working Group on Asset Recovery, as well as in response to document CAC/COSP/2017/5. The present note reflects the responses received to date from the following States parties: Brunei Darussalam, China, Ecuador, Germany, Guatemala, Hungary, Israel, Myanmar, Pakistan, Panama, Paraguay, Poland, Romania, Russian Federation, Serbia, Switzerland and United States of America.

II. Recommendations issued and good practices identified regarding the implementation of chapters III and IV of the Convention

4. The selection of articles in the tables below is based on a quantitative analysis of observations made and good practices identified regarding the implementation of chapter III (table 1) and chapter IV (table 2) of the Convention. The observations and good practices have in part been reformulated in order to make them more broadly applicable and capture the essence of a wider range of country-specific observations, without changing their overall content and meaning. Table 3 contains observations relating to the overall effectiveness of the Implementation Review Mechanism.

Table 1
Most prevalent observations and good practices regarding chapter III (Criminalization and law enforcement)

Articles of the Convention	*Observations*	*Good practices*
All articles: general and cross-cutting recommendations	Strengthen, as appropriate, the collection and availability of statistical data on the implementation of anti-corruption measures across institutions, in particular statistical data on investigations, prosecutions and adjudications, for example through the creation of a national crime register or other mechanisms, which could also be made accessible to other States parties. Ensure that all categories of persons set out in art. 2(a) of the Convention are covered as public officials in the legislation. Consider consolidating or simplifying the legal framework to criminalize corruption offences, and consider clarifying interpretative principles. Continue to devote adequate resources and attention to capacity-building for authorities responsible for combating corruption and conducting financial investigations, including by undertaking a comprehensive assessment of technical assistance needs where needed. Sufficient resources should be made available to address capacity constraints in the areas of investigation, prosecution, and adjudication of cases.	
Bribery offences and trading in influence (arts. 15, 16, 18 and 21)	More clearly delineate all elements of the articles of the Convention, to ensure in particular that all modalities of the commission of an offence (promise, offer, giving, solicitation, acceptance), as well as third-party beneficiaries and indirect acts are covered, in accordance with the fundamental principles of the domestic law. Ensure that the subjects of the offence include all categories of persons listed in art. 2 of the Convention (see also above). Expand the objects of the offence, in particular as regards non-material benefits and payments or gratuities to expedite or facilitate an otherwise lawful administrative act or procedure.[a]	Wide scope of application of anti-bribery legislation to national and foreign public officials and officials of public international organizations, as well as to the private sector.

[a] See also, United Nations, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption, 7 October 2003, A/58/422/Add.1, under article 16, para. 1.

Articles of the Convention	*Observations*	*Good practices*
	Where national legislation contains exceptions or defences concerning, e.g., immunities for spontaneous confessions, the attempted commission of the offence, and acts committed with lawful authority or reasonable justification, align such exceptions with the requirements of the Convention, consistent with art. 30, para. 9, of the Convention.	
	With respect to bribery of foreign public officials and officials of public international organizations (art. 16), criminalize the active version and consider criminalizing the passive version of the offence and devote adequate attention to enforcement.	
	With respect to trading in influence (art. 18), a non-mandatory offence, consider adopting a specific offence, separate from bribery, covering all elements of art. 18, in particular the abuse of real or supposed influence.	
	With respect to bribery in the private sector (art. 21), a non-mandatory offence, consider applying the offence to any person who directs or works in any capacity for a private sector entity.	
Laundering of proceeds of crime (art. 23)	Include as predicate offences at least a comprehensive range of offences established in accordance with the Convention, whether committed within or outside the jurisdiction of the State party in question.	Comprehensive legal framework and "all crimes approach", despite not being specified by the Convention; anti-money-laundering regulations in place and enforced.
	Ensure that all modalities of the commission of the offence in para. 1 are covered.	
	Strengthen enforcement and address issues of overlapping mandates and challenges in coordination among the competent authorities responsible for money-laundering cases related to the proceeds of offences under the Convention.	
Statute of limitations (art. 29)	Establish a limitations period that gives adequate time for the completion of the full judicial process, including investigation, prosecution and adjudication, and establish a longer period or suspend its application where the offender has evaded the administration of justice.	Sufficiently long limitations period to allow for investigations and prosecutions of offences under the Convention; interruption or suspension mechanisms.

Articles of the Convention	*Observations*	*Good practices*
Prosecution, adjudication and sanctions (art. 30)	Ensure the efficiency, proportionality and dissuasive effect of sanctions for offences under the Convention, including by considering a more coherent approach in the sanctioning of offences (e.g. the harmonization of penalties according to the gravity of offences and across different anti-corruption laws); also consider adopting sentencing principles and monitoring the imposition of punishment, including, where applicable, plea bargains and out-of-court settlements (art. 30, para. 1), bearing in mind the independence of the judiciary. Establish a greater balance between immunities or jurisdictional privileges accorded to public officials and the possibility of effectively investigating, prosecuting and adjudicating offences under the Convention; in particular review the procedures for lifting immunities to avoid potential delays, the loss of evidence and any unnecessary obstacles preventing investigative steps from being taken before immunities are lifted (art. 30, para. 2). Consider adopting measures for the disqualification of persons convicted of offences under the Convention from holding public office (art. 30, para. 7).	Innovative mechanisms to calculate fines and sentences (such as calculating fines based on the benefits obtained and intended), and the existence of guidelines or practice directives for prosecutors and judges providing instructions on the application of penalties depending, inter alia, on the gravity of the corresponding offence, with due respect for the independence of the judiciary. Appropriate balance concerning criminal immunities for offences under the Convention and the successful investigations or prosecutions of public officials.
Freezing, seizure and confiscation (art. 31)	Take measures to enable confiscation of proceeds of crime derived from all offences under the Convention, including value-based confiscation. Expand the definition of proceeds of crime to ensure that all proceeds, property, equipment and instrumentalities as defined in the Convention are subject to the measures in art. 31. Strengthen the capacity of competent authorities and adopt mechanisms to swiftly trace, seize and freeze property and ensure that interim measures leading to confiscation apply to all offences under the Convention. Strengthen the administration of frozen, seized and confiscated property, in particular in the case of complex assets, and consider the establishment of a dedicated asset management office.	Comprehensive legislation for the confiscation of proceeds of crime, including value-based and non-conviction-based confiscation, and effective application of the legal framework in practice. Institutional arrangements, including coordination and the exchange of information among authorities, leading to successful confiscation cases, and the existence of specialized authorities dedicated to the administration of seized and confiscated assets. Confiscation may be ordered even if the offender cannot be convicted;

Articles of the Convention	*Observations*	*Good practices*
		shifting evidentiary standards or presumptions facilitating confiscation.
Protection of witnesses, experts and victims (art. 32)	Strengthen the effective protection of witnesses, experts and victims, as well as their relatives or associates, as appropriate, in particular by adopting a legal and institutional framework on witness protection and by means of adequate enforcement and funding. The framework for such protection should offer all necessary forms of protection, including physical protection and evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures their safety. Consider adopting a witness protection programme. Extend the scope of witness protection measures to all offences under the Convention. Strengthen the participation of victims in criminal proceedings (art. 32, para. 5).	
Specialized authorities (art. 36)		The establishment, where feasible and consistent with national priorities, of a specialized anti-corruption authority, a specialized anti-corruption unit within the police force and the prosecution service, and/or a specialized anti-corruption court. Specific mandate and independence mechanisms, as well as adequate capacity and resources for the specialized authorities. Operational measures to enhance effectiveness (e.g. information-sharing, inter-agency coordination, collection and use of relevant data, clear policy guidance,

Articles of the Convention	*Observations*	*Good practices*
		Inter-agency task forces to address corruption in certain sectors) leading to increased investigations and prosecutions.
Cooperation with law enforcement authorities (art. 37)	Adopt measures to encourage the cooperation of offenders in investigations and prosecutions, including by offering the possibility of mitigated punishment, plea bargaining or immunity from prosecution, and ensure such persons are subject to the protections in art. 32 of the Convention.	
Cooperation between national authorities (art. 38)		Effective cooperation mechanisms among the investigating and prosecuting institutions and public authorities, including through the exchange of personnel and information.
		Establishment of centralized bodies or mechanisms to facilitate coordination; inter-agency agreements and arrangements.
Cooperation between national authorities and the private sector (art. 39)		Active engagement of public authorities with the private sector, in particular through efficient information transfer mechanisms between investigative authorities and financial institutions, and through training of private sector entities on prevention measures and awareness-raising.
		Mechanisms to facilitate access to information by law enforcement authorities and to encourage the reporting of corruption.

Articles of the Convention	*Observations*	*Good practices*
		Establishment of bodies or mechanisms to facilitate cooperation, including integrity pacts and agreements or arrangements.

Table 2
Most prevalent observations and good practices regarding chapter IV (International cooperation)

Articles of the Convention	*Observations*	*Good practices*
All articles: general and cross-cutting recommendations	Consider the allocation of adequate resources to further strengthen the efficiency and capacity of international cooperation mechanisms.	Provision of training to practitioners, in particular law enforcement and judicial officers, regarding applicable laws, procedures and time frames to be followed in international cooperation cases, including the determination of dual criminality. Active participation in international and regional networks, platforms and forums aimed at promoting international cooperation. Efficient use of technology and electronic databases to track, monitor and follow up on international cooperation requests.
Extradition (art. 44)	Ensure that all offences established in accordance with the Convention are extraditable, such as by: (a) Using the Convention as a legal basis for cooperation on extradition; (b) Revising the minimum penalty thresholds for extradition or the lists of extraditable offences in domestic	Interpretation of the dual criminality requirement in extradition cases, focusing on the underlying conduct and not the legal denomination of the offence. Expedition of extradition proceedings, consistent with treaty

Articles of the Convention	*Observations*	*Good practices*
	legislation in case of the strict application of dual criminality requirements; (c) Interpreting the dual criminality requirement, focusing on the underlying conduct rather than the strict terminology of offences; and (d) Reviewing or concluding bilateral or multilateral extradition agreements and arrangements to cover all offences under the Convention.	requirements, through direct contacts between central authorities and use of electronic or other communication channels and networks.
Extradition and mutual legal assistance (arts. 44 and 46)	Ensure the quality, efficiency and effectiveness of national frameworks on international cooperation, including by putting in place and rendering fully operational information systems compiling in a systematic manner information on requests for extradition, mutual legal assistance and other forms of international cooperation, with a view to facilitating the monitoring of such requests, assessing the effectiveness of the implementation of international cooperation arrangements, and gathering comprehensive statistics. Make or update the requisite notifications to the United Nations as to: (a) Whether the State party takes the Convention as the legal basis for cooperation on extradition (art. 44, para. 6); (b) The designation of a central authority for mutual legal assistance (art. 46, para. 13); (c) The languages acceptable for mutual legal assistance requests (art. 46, para. 14).	Development or effective use of manuals, guidelines, checklists, dedicated platforms or model requests for extradition and mutual legal assistance with a view to providing administrative and legal certainty for making, processing and executing requests. Use of the Convention either as a legal basis for extradition and mutual legal assistance or as a tool to facilitate extradition and mutual legal assistance. The designation of central authorities for extradition and the identification of focal points for specialized areas of cooperation, such as money-laundering or asset recovery, and notification of whether the State party takes the Convention as the legal basis for cooperation on mutual legal assistance.
Grounds for refusing extradition (art. 44, para. 8)	Specify the conditions and grounds for refusing extradition more clearly in the national legislation.	

Articles of the Convention	*Observations*	*Good practices*
Procedure for extradition and mutual legal assistance (art. 44, para. 9 and art. 46, para. 24)	Ensure that extradition proceedings are carried out in the shortest possible time, and simplify and streamline procedures and evidentiary requirements relating thereto. Similarly, expedite the execution of mutual legal assistance requests.	
Consultations with requesting States parties (art. 44, para. 17 and art. 46, para. 26)	Engage in consultations with requesting States before refusing extradition and mutual legal assistance requests.	Consultations and communication with requesting States on a continuing basis, throughout the mutual legal assistance process, and involving central and law enforcement authorities, as applicable.
Mutual legal assistance (art. 46)		Provision of mutual legal assistance in the absence of dual criminality, consistent with treaty requirements and domestic law. Close communication and consultations between central authorities for mutual legal assistance, including the possibility of the requested authority accepting and reviewing requests before submission of a formal request. Application of formal requirements for the execution of mutual legal assistance requests in such a manner as to afford the widest measure of assistance (such as applying seals on translated documents, translation, etc.).
Spontaneous sharing of information (art. 46, paras. 4 and 5)	Allow for or expand the practice of spontaneous transmission, i.e. without a prior request, of information that could assist in undertaking or successfully concluding investigations and criminal proceedings in other States parties or could result in	

Articles of the Convention	*Observations*	*Good practices*
	formal mutual legal assistance requests being made by other States parties.	
Non-coercive mutual legal assistance in the absence of dual criminality (art. 46, para. 9)	Ensure that mutual legal assistance that does not involve coercive action can be provided even in the absence of dual criminality.	
Transfer of sentenced persons and transfer of criminal proceedings (arts. 45 and 47)	Establish a legal and procedural framework for the transfer of sentenced persons and the transfer of criminal proceedings, and consider entering into relevant bilateral or multilateral agreements.	
Law enforcement cooperation, joint investigations (arts. 48 and 49)	Take steps to enhance law enforcement cooperation and conclude agreements or arrangements to allow the competent authorities responsible for the investigation of corruption offences to establish joint investigative teams with law enforcement agencies in other jurisdictions.	Specialized capacities for cross-border law enforcement cooperation, in particular through the organization of joint anti-corruption training workshops and capacity-building exchange programmes (art. 48). Active use of joint investigation teams in transnational corruption cases, where feasible and consistent with national priorities (art. 49).
Special investigative techniques (art. 50)	Take measures to allow competent authorities to use special investigative techniques, to regulate their use and to ensure the protection and admissibility in court of evidence derived therefrom.	Wide use and application of special investigative techniques in corruption cases both domestically and internationally, in accordance with the principle of proportionality and the protection of fundamental rights.

Table 3
General observations and recommendations regarding the Implementation Review Mechanism

Articles of the Convention	*Observations*
General and cross-cutting recommendations	The Conference should continue to consider addressing unexpected challenges pertaining to the funding shortfall and delays in country reviews arising during future phases of the Implementation Review Mechanism. With a view to conserving resources and ensuring the timely completion of country reviews, the Conference should consider streamlining, in future phases of the Mechanism, the amount of information solicited from States parties, for example by focusing on updating information provided during the first review cycle or limiting the length of responses or supporting documents to the self-assessment checklist. The Conference should continue to work to improve the transparency and availability of information gathered during future phases of the Implementation Review Mechanism, building on the thematic reports produced by the secretariat, to provide more detailed information in areas such as individual country experiences and technical assistance needs.